80-526

Supreme Court, U. S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No._____

* * * * * * * *

JOHN MURRAY,
Petitioner

vs.

Branch Motor Express Company
and
Local 557, International
Brotherhood of Teamsters

* * * * * * * *

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * *

PETITION FOR A
WRIT OF CERTIORARI

HARRY GOLDMAN, JR.
1123 Munsey Building
Baltimore, Maryland 21202
(301) 837-4222
Attorney for the Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

JOHN MURRAY,
Petitioner

vs.

BRANCH MOTOR EXPRESS COMPANY
and
LOCAL 557, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Respondents

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner John Murray respectfully prays that a Writ of Certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Fourth Circuit entered in the entitled case on May 6, 1980.

QUESTIONS PRESENTED FOR REVIEW

* * * *

1. Is a Vaca vs. Sipes type action by a discharged employee against his union for breach of duty of fair representation and against his former employer for breach of contract, barred by employee's failure to exhaust internal union procedures which provide neither reinstatement nor back pay as a remedy?

2. Does 29 USCA 411(a)(4) apply to Vaca vs. Sipes type actions, so as to require exhaustion of internal union procedures, or is it limited to actions involving solely internal union affairs?

3. Can employee's failure to exhaust internal union procedures bar a Vaca vs. Sipes type action against employer or union when such exhaustion

cannot restore the grievance to the contractual grievance process?

4. Can either Employer or Union successfully plead the bar of non-exhaustion of internal union procedures when the union has allowed grieving of the original disciplinary action upon which the discharge was based to become time barred under the collective bargaining contract?

4a. If such plea can be made in such circumstances, do not the Employer and Union bear the burden of proving, factually, "adequacy" or non"futility"?

5. Was not the affirmance of the lower court's grant of Summary Judgment in favor of Employer based on a statement of Employer's counsel unsupported and contrary to the record, a violation of Petitioner's consti-

tutional rights of due process and jury trial?

PARTIES APPEARING
BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Petitioner John Murray was the plaintiff before the United States District Court for the District of Maryland and appellant before the Court of Appeals for the Fourth Circuit.

Branch Motor Express Company was one of the defendants in the District Court. The other defendant was Local 557, International Brotherhood of Teamsters.

On appeal before the Circuit Court defendant employer and defendant union were appellees.

TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI	1
QUESTIONS PRESENTED	2
PARTIES APPEARING BEFORE THE CIRCUIT COURT	4
OPINIONS BELOW & ORDER EXTENDING TIME TO FILE PETITION	5
STATEMENT OF JURISDICTION	6
STATUTORY PROVISIONS INVOLVED	7
CONSTITUTIONAL PROVISIONS INVOLVED	9
STATEMENT OF CASE	10
REASONS FOR ALLOWANCE OF THE WRIT	17
CONCLUSION	34
A P P E N D I X	35
OPINION OF THE U.S. CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT 79-1485	35
JUDGMENT OF THE CIRCUIT COURT OF APPEALS	39

TABLE OF CONTENTS
(Cont'd)

	Page
OPINION OF THE U.S. DISTRICT COURT CIVIL HM 78-1714	40
JUDGMENT OF THE DISTRICT COURT	51
ORDER OF THE SUPREME COURT EXTENDING TIME TO FILE PETITION FOR CERTIORARI A-105	53

TABLE OF AUTHORITIES

Cases	Page
Baldini v. Auto Workers 581 F.2d 145 (C.A. 7, 1978)	33
Brady v. TWA 223 F.Supp. 361 (D. Del, 1963) aff'd. 401 F.2d 87 (C.A. 3, 1968) cert. den. 393 U.S. 1048, 89 S.Ct. 680	20, 25, 33
Cammarata v. Ice Cream Drivers, Local 757, 441 F. Supp. 696, aff'd. 591 F.2d 1329 (C.A.2,1978)	27, 32
Chambers v. Local Union 639 578 F.2d 375 (C.A.D.C., 1978)	20, 24, 25, 27
Czosek v. O'Mara 397 U.S. 25, 90 S.Ct. 770	23, 26
De Arroyo v. Sindicato Trabajadores Packinghouse 425 F.2d 281 (C.A. 1, 1970)	26, 33
Detroy v. A. G. V. A. 286 F.2d 75 (C.A. 2, 1970)	33
Fizer v. Safeway Stores, 586 F.2d 182 (C.A. 10, 1978)	33
Geddes v. Chrysler Corp. 608 F.2d 261, (C.A. 6, 1979)	23
Glover v. St. Louis S.F.R.Co. 393 U.S. 324, 89 S.Ct. 548	23, 25, 26

TABLE OF AUTHORITIES

Cases	Page
Harrison v. Chrysler Corp. 558 F.2d 1273 (C.A. 7, 1977)	28, 29, 30
Hines v. Anchor Motor Freight, Inc. 424 U.S. 554 96 S.Ct. 1048	17, 19, 23, 25, 26
I.B.E.W. v. Foust 442 U.S. 42, 99 S.Ct. 2121	17
Imal v. Zohn 481 F.2d 181 (C.A. 10, 1975)	31
ITT Gilfillan v. Clayton, Clayton v. U.A.W. No. 80-54, 5049	17, 18
Clayton v. ITT Gilfillan 104 L.R.R.M. 2118 (C.A. 9, 1980) Petition for Certiorari filed 7-11-80 49LW 3141	28, 30
Miller v. Gateway Transportation Co. & Teamsters Local 710 103 L.R.R.M. 2591, 616 F.2d 272 (C.A. 7, 1980)	24, 27, 28, 29, 30
NLRB v. Industrial Union of Marine & Shipbuilding Workers 391 U.S. 418, 88 S.Ct. 717	19, 20, 21

TABLE OF AUTHORITIES

Cases	Page
Poller v. Columbia Broadcasting System Co., Inc. 368 U.S. 464, 82 S.Ct. 486	31
Rizzuto v. W. Conf. of Teamsters' Pension Trust 573 F.2d 553 (9 Cir. 1978)	22
Vaca v. Sipes 386 U.S. 171, 87 S.Ct. 903	17, 19, 23, 25, 26, 33
Wiglesworth v. Teamsters Local Union 592, 552 F.2d 1027 (4 Cir. 1976)	22, 32
Winters v. Local Union 639, International Brotherhood of Teamsters, 569 F.2d 146, (C.A. D.C.., 1978)	22, 31
Yeager v. Schmidt, 355 F. Supp. 332, (D.C. E.D. Pa., 1973)	32
Zamora v. Massey Ferguson, 366 F.Supp. 588 (D.C. Iowa, 1972)	26

Statutes	
Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411	20, 21

TABLE OF AUTHORITIES

Statutes

29 U.S.C. 411(a)(4)	21, 22
Fifth Amendment of the Constitution of the United States	30
Seventh Amendment of the Constitution of the United States	31
Section 301 (29 U.S.C. 185) Labor Management Relations Act, 1947	10, 17, 18, 21
29 U.S.C.A. 185 (b)	25

Other Authorities

The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases 32 Rutgers Law Review 520 (1979)	19

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and unpublished. It was rendered on May 6, 1980, and on the same day Judgement was entered thereon. The opinion appears in the Appendix (Page 39).

The initial Judgement rendered in the United States District Court was entered on July 31, 1979, pursuant to an opinion of the Honorable Herbert F. Murray, District Judge. The opinion was not officially reported and appears in the Appendix at Page 40.

By Order dated August 4, 1980, the time for filing this petition for Writ of Certiorari was extended to September 30, 1980, by the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court. (Appendix P. 53)

JURISDICTION

This petition for Writ of Certiorari is timely filed pursuant to the Order of the Chief Justice referred to hereinabove. This Court's Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29, Sec. 185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. United States Code, Title 29, Sec. 411(a)(4)

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative

agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any

such action, proceeding, appearance, or petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

"No person shall...be deprived of...property without due process of law..."

Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

STATEMENT OF THE CASE

The plaintiff was finally discharged by the employer, Branch Motor Express, on January 20, 1976. That discharge was upheld by an arbitrator on April 28, 1976. Murray filed his complaint in the United States District Court for the District of Maryland on September 13, 1978, against the employer and his local union, under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Sec 185, alleging the discharge to have been a breach of the collective bargaining agreement covering him, i.e., National Master Freight Agreement and Maryland-District of Columbia over-the-road Supplemental Agreement 1973-1976.

Murray was discharged on January 20, 1976, on the accusation that he had refused a work assignment on January 19,

1976. Murray alleged, principally, that the union had breached its duty of fair representation to him by failing to grieve prior warning notices of September 16, 1975 and October 7, 1975, which notices were a prerequisite, under the collective bargaining agreement, for the January 20, 1976 discharge. He claimed that the local union had misinformed him that these warning notices would not count against him, when in fact no such agreement had been reached between the Employer and the Union, and in the meantime the union had allowed the time to lapse for grieving the 1975 warning notices and progressing them to arbitration. Murray's repeated inquiries of the Union Business Agent concerning expungement of the warning notices were met with the reply that the Business Agent was working on the pro-

blem. This state of affairs continued up to the day of the arbitration. As a result of this breach of duty of fair representation alleged by Murray, the arbitrator was able to find that the 1975 warning letters were validly issued and outstanding and to uphold the January 20, 1976 discharge on its merits.

Murray had prayed a jury trial, but the case was disposed of by the District Court on motions for summary judgment, after argument. At the lower court argument, both defendants' attorneys conceded that the right to grieve the 1975 warning notices had become time barred and that the Employer had a right under the collective bargaining agreement to refuse any attempt by the union to consider any attack by the union on the merits of the 1975 warnings. (The agreement required the union to

file a written notice of protest within 10 days after It was notified that a warning letter has been issued to one of its members; the protest is routinely done by the use of a rubber stamp.)

It was conceded by the plaintiff that no attempt was made by the plaintiff to prefer charges against any of the local union officers or members who would have been responsible for either failing to file a protest of the 1975 notices, to properly record a purported agreement between the Union and the Employer that the warning notices would not count against Murray or for falsely representing to Murray that such were the terms of a union-company agreement. The Teamsters Constitution provides for trials of local union officers or members, but provides neither for money damages in the form of back pay nor, of course,

reinstatement to Murray's former position as over-the-road truck driver.

Nevertheless, the District Court dismissed the action, granting summary judgment in favor of both defendant Employer and defendant Union on the grounds that Murray had failed "to exhaust intra-union remedies." Thus, Murray lost his employment as a truck driver of some 9 years seniority with Branch Motor Express Company.

Plaintiff contended in the District Court that Summary Judgment could not be granted on the Defendants' affirmative defense of failure to exhaust intra-union procedures because any grievance of the 1975 warning letters had become time barred under the collective bargaining agreement. This, plaintiff alleged, was a sufficient showing of the "futility" of such pro-

cedures, so as to excuse any attempt by plaintiff to utilize them. In spite of the concession of counsel for both defendants that the grievance was time barred, the lower court held, "Plaintiff contends that such exhaustion would have been fruitless but provides no support for that contention." (Appendix P. 44)

In affirming as to the Union, the Court of Appeals Panel held that plaintiff had not "adduced evidence to make the "'clear and positive showing"' of the inadequacy or futility of union remedies which would excuse his failure to exhaust." (Appendix P. 36) With respect to the Employer, the Panel wrote: (Appendix P.37)

> The employer concedes (Sic) that if Murray is successful in establishing through his intra-union remedy that he was not fairly represented in the grievance arising out of his discharge or in the original dis-

ciplinary action upon which the discharge was based, the employer would be bound to reconsider its action.

Emphasis and matter in parentheses added.

The "concession" above referred to had no basis in the record on appeal. It was made for the first time as an unsupported statement of Employer's counsel at oral argument in the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

The Supreme Court of the United States fashioned the remedy for individual employees, against both employers and unions, where the employees' right of fair representation and their rights under collective bargaining agreements are violated. Section 301 (29 U.S.C. 185), Vaca vs. Sipes 386 US 171, 87 S. Ct. 903, Hines vs. Anchor Motor Freight, Inc. 424 US 554 96 S. Ct. 1048, I.B.E.W. vs. Foust, 442 U.S. 42 , 99 S. Ct. 2121 The Supreme Court has never ruled on the issue presented by this petition; Whether the failure to exhaust internal or intra-union procedures can bar such an action against the union or the employer or both. (The Court now has these questions before it on Petitions for Certiorari to the Court of Appeals

for the Ninth Circuit, ITT Gilfillan vs. Clayton, Clayton vs. UAW, No. 80-54,5049 filed July 11, 1980.) Various Circuit Courts of Appeals have created and refined non-exhaustion of internal union procedures as a bar, in favor of the union alone, or the employer and the union. The Circuit Courts are clearly divided on the effects of the failure of an employee to exhaust intra-union procedures on the employee's suit under Section 301. Petitioner submits that This Court should decide these questions.

It is the position of petitioner that this defense, if it is uncritically allowed to the extent that it was in the case at bar, and in some of the other Circuit Court decisions, will substantially nullify the remedy and rights of the individual employee that

This Court declared in Vaca and Hines. Argument on the questions presented follows.

This Court has never considered the issue of non-exhaustion of internal union remedies to be a bar to a 301 fair representation case.[1]

Petitioner submits that in the closest analogous case involving internal union procedures, NLRB vs. Industrial Union of Marine and Shipbuilding Workers, 391 U.S. 418, 88 S.Ct. 717, This Court found that exhaustion of internal union procedures was not required before resort by the employee to the National Labor Relations Board. The Court held that exhaustion was not required where the dispute involved

[1] See The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases 32 Rutgers Law Review 520 (1979)

complex problems involving the employer, the union and the member and touched, not solely on the internal affairs of the Union, but on the public domain governed by the Labor Management Reporting and Disclosure Act of 1959. Ibid at 391 U.S. 424, 425.

The same reasoning, it is submitted should govern resort to the Federal Courts in a fair representation action. See Chambers vs. Local Union 639 578 F.2d 375, 384-388 (C.A. D.C., 1978). Where the dispute similarly involves complex issues between employee, union and employer and depends upon Federal Labor Law derived from the union's duty of exclusive representation imposed by the National Labor Relations Act, not purely Its internal affairs, resort to internal union procedures should not be required. Brady vs. TWA

223 F.Supp. 361 (D. Del, 1963) aff'd. 401 F.2d 87 (C.A. 3, 1968) cert. den. 393 U.S. 1048, 89 S.Ct. 680.

It is on the basis of NLRB vs. Industrial Union, supra, that petitioner would argue that 29 U.S. C.A. 411(a)(4) requires exhaustion of internal union procedures only in a purely intra-union dispute concerning the rights guaranteed by 29 U.S.C.A. 411, such as the right of the individual member within the union to vote, to speak out at meetings and not to be expelled except for non-payment of dues, unless the procedural safeguards set forth in that Statute are followed. It is Petitioner's position that Section 411(a)(4) does not apply to a 301 case such as that at bar, although the lower court implicitly so held on the basis of Winter vs. Local Union 639,

International Brotherhood of Teamsters, 569 F.2d 146, (C.A. D.C., 1978) which relied on 29 U.S.C. 411(a)(4). However, the other two cases cited by the Court below on the exhaustion point, in error Petitioner respectfully submits; Wiglesworth vs. Teamsters Local Union 592, 552 F.2d 1027 (4 Cir. 1976) and Rizzuto vs. W. Conf. of Teamsters' Pension Trust, 573 F.2d 553 (9 Cir. 1978) both involve purely internal union disputes to which the employer was not a party, nor a party-litigant.

Petitioner submits that any duty which has been generated by the Circuit Courts of Appeals to exhaust internal union procedures must be meticulously distinguished from the duty imposed by the Supreme Court to exhaust contractual procedures and

remedies provided by the collective bargaining agreement between union and employer. Vaca vs. Sipes, 386 U.S. 171, 184-186, 87 S.Ct. 903, 914. Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554, 565-568, 96 S.Ct. 1048, 1957, 1058. See also Czosek vs. O'Mara 397 U.S. 25, 26, 28, 90 S.Ct. 770, 772, 773, Glover vs. St. Louis S.F.R. Co. 393 U.S. 324, 330, 331, 89 S. Ct. 548. See Geddes vs. Chrysler Corp. 608 F.2d 261, 263 (C.A. 6, 1979).

The obvious and basic distinction between the rule of law which This Court has enunciated requiring exhaustion of contractual remedies and the rule of some Circuit Courts that intra-union procedures must be exhausted, is that exhaustion of contractual remedies may lead to vindication of all rights to which the em-

ployee could be entitled in a Section 301 suit. Intra-union procedures, on the other hand, almost never can grant reinstatement to an employee's former employment, following discharge, back pay, increased seniority rights, contractual benefits and the like. Miller vs. Gateway Transportation Co. and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 272, 275 (C.A. 7, 1980) Chambers vs. Local 639, Teamsters 578 F.2d 375, 387, 388 (C.A. D.C. 1978). Thus, internal union procedures would seem inadequate at the outset.

In addition, Petitioner would submit, the requirement of exhaustion of internal union remedies is logically inimical to a claim of unfair representation by the same union. This Court has repeatedly stressed the fundamental precept that tribunals or

procedures controlled by the individuals or entities to be tried are suspect at the outset. Vaca, Hines, Glover Ibid, supra As the Third Circuit Court of Appeals said in Brady (401 F.2d 87,93):

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining agent."

Accord, Chambers vs. Local 639, 578 F.2d 375, 387.

After all, as in the case at bar, the Business Agent who has already let the time pass to bar the grievance has bound the Union by his negligence. 29 U.S.C.A. 185(b). What would the Union decide in any internal procedure trying the Business Agent, for bad representation, where, as here, the grievance is time barred? The Union

could not find against the Business Agent without making the Union liable and making a prima facie case against the employer ,on the employee's behalf, as well. In addition, inertia inherent in any bureaucracy, including a union, makes reversal unlikely.

Therefore, fully in keeping with the principles stated by This Court in Vaca, Hines, Glover and Czosek, The First Circuit Court of Appeals has implied that a colorable claim of unfair representation excuses exhaustion. De Arroyo vs. Sindicato Trabajadores Packinghouse 425 F.2d 281 (C.A. 1, 1970) See Zamora vs. Massey Ferguson 336 F.Supp. 588 (D.C. Iowa, 1972).

The Court should grant Certiorari in this case because:

First, contrary to the holding of the Court of Appeals for the Fourth Circuit here, two Circuit Courts of Appeal have held the remedies afforded by resort to the internal union procedures afforded by the Teamsters' Constitution to be inadequate in that they provide neither reinstatement nor back pay. Miller vs. Gateway Transportation Company and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 375, 387, 388 (C.A. D.C. 1978), Chambers vs. Local Union 639 578 F.2d 375 (C.A. D.C. 1978) Cf. Cammarata vs. Ice Cream Drivers, Local 757 441 F.Supp 696, 701, aff'd. 591 F.2d 1329 (C.A. 2, 1978).

Secondly, in the case at bar, exhaustion of internal union procedures was shown to be futile, because on the

face of the collective bargaining agreement, grieving was time barred, of the original disciplinary action upon which Murray's discharge was based. This was conceded in the lower court by counsel for both defendants. Thus, as two other Circuit Courts have held, in conflict with the appellate Court in the case at bar, the affirmative defense of non-exhaustion of internal union procedures was not available to the employer as a matter of law. Harrison vs. Chrysler Corp. 558 F.2d 1273, (C.A. 7, 1977), Miller vs. Gateway Transportation Co. and Teamsters Local 710 103 L.R.R.M. 2591, 2593, 616 F.2d 375, 387, 388 (C.A. D.C. 1978). Clayton vs. ITT-Gilfillan 104 L.R.R.M. 2118 (C.A. 9, 1980).

Here, employer's counsel's self-serving statement in oral argument

before the Fourth Circuit Court of Appeals, in aid of the Employer's defense of non-exhaustion of union procedures, that Employer would have waived Its right to bar grievance and gratuitously ignoredthe collective bargaining agreement, is "patently frivolous." Harrison, supra, 558 F.2d 1273, 1279. Miller, supra, 616 F.2d 272, 275 Footnote 5.

Thus, appellate Court Opinion in the case at bar is at odds with that of the Seventh Circuit Court of Appeals on the point of whether an employer may rely on exhaustion of internal union procedures as an affirmative defense when the contract bars restoration of the grievance to the grievance process.

Petitioner contends that the speculative claim that Employer would have gratuitously waived its contract

right was at least an issue of fact which could not be determined on Summary Judgment. There was no evidence in the record before the lower court to support this contention.

This contention was advanced at oral argument and accepted on Appeal. The Fourth Circuit Court of Appeals then proceeded to affirm dismissal of employee's suit against the Employer on the grounds of employee's non-exhaustion of internal union procedures. In so doing, the Court of Appeals for the Fourth Circuit adopted a legal position squarely at odds with two other Circuits, the Seventh and Ninth, Harrison, Miller, Clayton, supra.

The Fourth Circuit Court of Appeals also, petitioner submits, violated the right of due process in finding a fact outside the record based merely on a

statement of counsel at the appellate stage. Further violated was the right of jury trial of any material question of fact, which must be protected in any Summary Judgment procedure. Poller vs. Columbia Broadcasting System Co., Inc. 368 U.S. 464, 82 S. Ct. 486.

Petitioner submits that the authorities cited in support of his position in the case at bar, from other Circuit Courts of Appeal, are in material conflict with the holding of the United States Court of Appeals for the Fourth Circuit in the instant case. See Winter vs. Local Union 639 Teamsters, 569 F.2d 146 (C.A. D.C., 1978), Imal vs. Zohn 481 F.2d 181 (C.A. 10, 1975). In addition, the exhaustion requirement of 29 U.S.C. 411(a)(4) has been indiscriminately applied, as here, in 301 cases as well as purely internal union

affairs cases involving free speech or pension rights, having nothing to do with the collective bargaining contract, e.g. Wiglesworth vs. Teamsters Local Union 592, 557 F.2d 1027, (C.A. 4, 1976).

The burden of proof as to the inadequacy of internal union procedures and whether they are futile has been regarded differently in the various Circuits. As to the Teamsters' Constitution at issue here, the vagueness of its remedies has led the District Courts of two Circuits to require the Union to prove factually the efficacy of its procedures in order for it to raise the defense. Yeager vs. Schmidt 355 F.Supp. 332, (D.C. E.D. Pa., 1973), Cammarata vs. Ice Cream Drivers Local 757, 441 F.Supp. 696, 701, supra. This position is in conflict with the case at bar and other District Court cases cited by the District Court in Its

Opinion. Appendix P. 44,47.

More uncertainty is, of course, engendered by conflict among the Circuits as to the right to raise the defense at all, on the part of the Union or the Employer, where full relief by way of reinstatement and back pay is not available through internal union procedures. Barring the defense to either are De Arroyo vs. Sindicato, supra, (C.A. 1, 1970) Detroy vs. A.G.V.A. 286 F.2d 75 (C.A. 2, 1970) Brady vs. T.W.A., supra. Requiring exhaustion as to the Union are Baldini vs. Auto Workers 581 F.2d 145 (C.A. 7, 1978) and Fizer vs. Safeway Stores 586 F.2d 182 (C.A. 10, 1978).

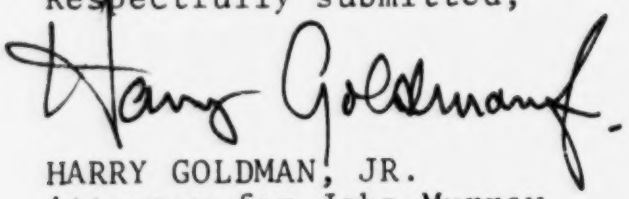
If Vaca - Sipes fair representation suits are to remain as a protection for the rights of individual enployees as This Court has determined, Certiorari should be granted.

CONCLUSION

* * * *

For the foregoing reasons and authorities Petitioner prays The Court to grant Its Writ of Certiorari in this cause.

Respectfully submitted,



HARRY GOLDMAN, JR.
Attorney for John Murray,
Petitioner
1123 Munsey Building
Baltimore, Maryland 21202
(301) 837-4222

September 30, 1980

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

John Murray,
Appellant

vs.

Branch Motor Express Company
and Local 557, International
Brotherhood of Teamsters,
Appellees

No. 79-1485
UNPUBLISHED

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge

Argued April 11, 1980
Decided May 6, 1980

Before: WINTER, RUSSELL and SPROUSE, Circuit Judges.

Per Curiam:

John Murray sued his union and his employer, pursuant to 29 U.S.C. Sec. 185, alleging the union's breach of its duty of fair representation and

his wrongful discharge by the employer in violation of the collective bargaining contract. The district court granted summary judgement for both defendants because Murray had failed to exhaust the intra-union remedy available to him under his union's constitution. We affirm.

The district court was correct in ruling that a union member must exhaust internal union remedies before he may sue his union for breach of the duty of fair representation. Wiglesworth v. Teamsters' Local Union #592, 552 F.2d 1027 (4 Cir. 1976); Rizzuto v. W. Conf. of Teamsters Pension Trust, 573 f.2d 553 (9 Cir. 1978). There are, of course, exceptions to the rule, but we do not think that Murray adduced evidence to make the "clear and positive showing" of the inadequacy or futility of union

remedies which would excuse his failure to exhaust. Winter v. Local Union #639, International Brotherhood of Teamsters, 569 F.2d 146, 149 (D.C. Cir. 1978).

While it may not follow in every case with the same certainty that night follows day that the suit against the employer should also be dismissed,* we think that dismissal here was proper. Resort to union procedures may obviate the need for the wrongful discharge suit. The employer concedes that if Murray is successful in establishing through his intra-union remedy that he was not

*See Peterson v. Rath Packing Co., 461 F.2d 321 (8 Cir. 1972); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278 (7 Cir. 1977); and Orphan v. Furnco Construction Corp., 466 F.2d 795, 800 (7 Cir. 1972).

fairly represented in the grievance arising out of his discharge or in the original disciplinary action upon which the discharge was based, the employer would be bound to reconsider its action. Thus, there is no reason for the suit against the employer to proceed until the union remedy has been exhausted.

Affirmed.

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

May 6, 1980

* * * * * * * * * * *

NOTICE OF JUDGEMENT

Judgement was entered
in
Case No. 79-1485
this date.

* * * * * * * * * * *

WILLIAM K. SLATE, II
CLERK

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

John Murray	*	
v.	*	CIVIL NO. HM78-1714
Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters	*	

****

M E M O R A N D U M

Plaintiff brought this action for damages and reinstatement against his former employer and his local union, pursuant to 29 U.S.C. Sec. 185 and 411. Plaintiff alleges that his termination by Branch Motor Express for insubordination was wrongful and that Local 557 of the International Brotherhood of Teamsters breached its duty of fair representation in conjunction with that termination. Both defendants have

moved for summary judgement on the grounds, among others, that plaintiff failed to exhaust his administrative remedies provided by the union constitution. The court heard argument on the motion on Tuesday, July 24, 1979, and by this memorandum and order grants the motions based on plaintiff's failure to exhaust intra-union remedies.

Plaintiff is an over-the-road truck driver who formerly worked for Branch and was a member of the defendant local union. Plaintiff was discharged on January 20, 1976 for refusing to deliver materials to Syracuse, New York as ordered by his supervisor in Baltimore. The employer based such discharge in part upon the fact that plaintiff had been given a warning letter on September 16, 1975 reprimanding him

for insubordination and informing him that any further insubordinate conduct would result in termination. When he refused a work assignment on January 19, 1976 he was terminated in accordance with Article 46 of the collective bargaining agreement which provides that an employee may be terminated for just cause if he has received a written warning within the previous nine months. Plaintiff and the union subsequently presented the termination for arbitration. The arbitrator heard the matter on April 22, 1976 and upheld the termination.

Plaintiff's principal complaint is that the September 16, 1975 warning letter was improperly issued and should have been removed from his personnel file. He contends that he sought the

removal of the letter from the file but that the local union failed to achieve that result. But for the existence of that letter, plaintiff contends, the arbitrator could not have upheld termination on the January 19, 1976 incident. Plaintiff additionally alleges in very general terms that the union did not adequately represent him at the arbitration hearing and that there was not adequate cause for his termination.

Article XIX, Section 12 of the 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America provides that a member must exhaust internal union remedies against the union and its agents before bringing suit against them for breach of duty of fair representation in regard to

disciplinary proceedings. The union contends and plaintiff admits that plaintiff did not exhaust internal remedies with regard to either the union's failure to remove the warning letter or its representation in the subsequent termination proceedings. Plaintiff contends that such exhaustion would have been fruitless, but provides no support for that contention.

The courts have routinely upheld the validity of internal exhaustion clauses in cases of this sort. In Fabian v. Freight Drivers & Helpers Local No. 557, 448 F.Supp. 835 (D. Md. 1978), Judge Young of this court enforced the identical constitutional provision invoked here and granted defendant's motion for summary judge-

ment where plaintiff had failed to exhaust the established union procedures.

Judge Young recognized two exceptions to the exhaustion requirement, the first being where the procedures provided are inadequate. That contention failed in Fabian and fails here where numerous courts have upheld the adequacy of the remedies provided by the Teamsters' Constitution. Winter v. Local No. 639, IBT, 569 F.2d 146 (D.C. Cir. 1977); Petroff v. Teamsters Local 614, 96 LRRM 3410 (D.D. Mich. 1977). See also Rizzuto v. Teamsters Pension Trust, 573 F.2d 552 (9th Cir. 1977); Wigglesworth v. Teamsters Local No. 592, 552 F.2d 1027 (4th Cir. 1976).

The second exception to the exhaustion requirement is where union hostility would make exhaustion futile. Judge Young noted that plaintiffs who

seek to avoid exhaustion of union remedies on this ground must do more than generally allege hostility by union officials but must show "circumstantial evidence or concrete evidence of personal animus" against them by union officials. 448 F.Supp. at 839. Judge Young further notes that where exhaustion was excused on this ground the fact situations were extreme.

In the instant case plaintiff has demonstrated no personal animus by any union official, let alone any officials who would ultimately hear plaintiff's complaint. Accordingly, plaintiff's failure to exhaust the Teamsters' internal remedies precludes this suit against the union.

Branch Motor Express joined the union's motion for summary judgment

arguing that had plaintiff exhausted his remedies against the union, he could have obviated this action against it also. Several courts have allowed dismissal of suits against employers under 29 U.S.C. Sec. 185 where they made a previous finding that the employee had not exhausted his internal remedies against the union. See, e.g. Kobielnik v. Teamsters Local 107, 101 LRRM 2541 (E.D. Pa. 1979); Pawlak v. Teamsters Local 764, 444 F.Supp. 807 (M.D. Pa. 1977), aff'd 571 F.2d 572 (3d Cir.1977); Bradley v. Ford Motor Company, 417 F. Supp. 23 (N.D. Ill. 1975); Flemming v. Chrysler Corporation, 416 F.Supp.258 (E.D. Mich. 1975). In Kobielnik and Pawlak the courts dismissed sua sponte after dismissing suit against the unions, holding that the failure to exhaust internal union remedies also

barred the action against the employer.

In Neipert v. Arthur G. McKee & Company, 448 F.Supp. 206 (E.D. Pa. 1978) the court considered the cases in this area and held that where the union had procedures whereby it could consider the propriety of past actions and take steps to remedy them, the employee must exhaust those remedies prior to instituting suit against the employer. The court premised that find on the fact that the union could reinstate grievance proceedings to remedy past wrongs. The court finds this reasoning equally applicable here.

In granting summary judgment for the defendants the court is recognizing the well-established tenet of labor law, that courts should not intervene in labor disputes until the parties have

made every reasonable attempt to solve their problems themselves. Although this suit was filed more than two years after the complained of events, there is no evidence of any effort to rectify the situation with established intra-union remedies during the interim.

The court also heard argument on defendant union's motion for summary judgment on the ground that the record reveals adequate representation of plaintiff by Mr. Rubenstein at the arbitration hearing. The court feels that plaintiff's charge is subject to the same exhaustion requirements in this instance also, and therefore declines to reach the merits of this motion.

The court will therefore enter an order granting summary judgment for

the defendants.

s/ Herbert F. Murray

Dated: July 31, 1979

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

John Murray	*	
v.	*	CIVIL NO. HM78-1714
Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters	*	

* *

O R D E R

Pursuant to the foregoing memorandum, it is this 31st day of July, 1979, by the United States District Court for the District of Maryland,

ORDERED,

(1) that the motions of defendants Branch Motor Express Company and Local No. 557 International Brotherhood of Teamsters for summary judgement be, and the same hereby are,

Granted;

(2) that the Clerk of the Court is directed to mail copies of this Memorandum and Order to the parties.

s/ Herbert F. Murray
UNITED STATES DISTRICT JUDGE

A P P E N D I X

SUPREME COURT OF THE UNITED STATES

No. A-105

JOHN MURRAY,
Petitioner

v.

BRANCH MOTOR EXPRESS COMPANY,
ET AL.

* * * * * *

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

* * * * * *

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including SEPTEMBER 30, 1980.

s/ Warren S. Burger
Chief Justice of the United States.

Dated this 4th
day of August, 1980